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No. 02-241

In the

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the University of Michigan Law School's use of racial preferences in student admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Should an appellate court required to apply strict scrutiny to governmental race-based preferences review *de novo* the district court's findings because the fact issues are "constitutional?"

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CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner Barbara Grutter. Consent to file this brief was obtained from all parties and has been lodged with the Clerk of this Court.[1] Amicus is a nationwide nonprofit public interest law foundation with extensive experience in briefing the legal issues raised by the government's use of racial preferences. Amicus seeks to file this brief to advance its interest in equal treatment under law.

STATEMENT OF THE CASE

This is an action brought in part under the Equal Protection Clause of the Fourteenth Amendment. Petitioner Barbara Grutter applied in 1996 to the University of Michigan Law School (law school) but her application was rejected because the law school uses race as a predominant factor in admissions, giving minority applicants a significantly greater chance of admission than students with similar qualifications from disfavored racial groups. The minorities given special preference by the law school are African American, Native American, Mexican American, and mainland Puerto Rican students. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 823-24 (E.D. Mich. 2001). After trial, the district court held that the law school's use of race in its admissions decisions violates the

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Equal Protection Clause of the Fourteenth Amendment and enjoined the law school from using applicants' race as a factor in its admissions decisions. *Id.* at 872. On appeal, the Sixth Circuit reversed, holding that Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), permitted state schools to use the consideration of race as a factor in granting admission. *Grutter v. Bollinger*, 288 F.3d 732, 751-52 (6th Cir. 2002). This Court granted certiorari.

SUMMARY OF ARGUMENT

Although the Sixth Circuit relies almost entirely on the opinion of Justice Powell in *Bakke*, it fails the test set forth in that opinion. Instead of race being merely one element, a "plus factor," in attainment of diversity in the law school's admissions program, for the favored minorities it is the determinative element. And contrary to Justice Powell's specifications, the law school set targets for minority admissions and met or exceeded those targets.

However, this Court has not accepted Justice Powell's finding that racial diversity in education is a compelling state interest. Rather, it has required that racial classifications be based on remedying past discrimination by the government unit involved. This limitation has been followed by other circuits except the Ninth Circuit. Here, there was no allegation or indication of discrimination against minorities by the law school.

The law school's rationalization of race preferences on the ground that minority group members have different "experiences and perspectives" is a stereotype that has been rejected by this Court and other circuits who demand that minorities be treated as individuals.

ARGUMENT

I

THE LAW SCHOOL'S RACE-CONSCIOUS ADMISSIONS POLICY VIOLATES THE STANDARDS SET BY JUSTICE POWELL IN *BAKKE*

A. The Law School's "Critical Mass" Is the Functional Equivalent of a Race Quota

The law school's general standard for admission is a composite of the applicant's Law School Admissions Test (LSAT) score and undergraduate grade point average (UGPA). *Grutter*, 137 F. Supp. 2d at 825. The district court found that the law school's written and unwritten policy is to ensure that 10-17% of the entering class be members of the preferred minority groups and that the law school achieved and even exceeded this "goal" even though the minority students admitted had generally lower LSAT scores and UGPA's than other admittees. *Id.* at 842. For example, in the 1994 law school entering class, white students had a median LSAT score of 168 and a median UGPA of 3.57, while the corresponding figures were 157 LSAT and 2.97 UGPA for African American students, and 162 LSAT and 3.26 UGPA for Mexican American students. *Id.* at 833 n.11.

The Sixth Circuit relies on Justice Powell's opinion in *Bakke*, 438 U.S. 265, to uphold the validity of the law school's race-preference admissions program. *Grutter v. Bollinger*, 288 F.3d at 738-51. However, the admissions program fails the tests set forth in that opinion. There, as here, the school denied it employed a racial quota. "Petitioner prefers to view it as establishing a 'goal' of minority representation in the Medical School." *Bakke*, 438 U.S. at 288. As Justice Powell observed:

> This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race

> and ethnic background . . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

Id. at 289.

Here, the law school's admissions policy specifies " 'a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against.' " *Grutter*, 288 F.3d at 737 (quoting the law school's written admissions policy). The Sixth Circuit found that the law school considers "the number of under-represented minority students, and ultimately seeks to enroll a meaningful number, or a 'critical mass,' " thereof. *Id.* But this somewhat more sophisticated semantic distinction is still beside the point. It is a line drawn on the basis of race and ethnic status. The district court found that in pursuit of this commitment, the law school had granted preference to members of particular racial groups for more than 30 years. *Grutter*, 137 F. Supp. 2d at 839.

Justice Powell found that if the school's purpose was to assure some specified percentage of a group merely because of its race, such preferential purpose was facially invalid as discrimination for its own sake. *Bakke*, 438 U.S. at 307. Here, Allan Stillwagon, the law school's former director of admissions, testified that the school had a special admissions policy including a " 'goal' or 'target' whereby 10-12% of the students of each entering class should be Black, Chicano, Native American, and mainland Puerto Rican." *Grutter*, 137 F. Supp. 2d at 830-31. Stillwagon testified that he had no discretion to disregard this policy and that this "goal" was flexible only to the extent that the number of minority admittees could deviate by three or four students on either side of the "goal." *Id.* at 831. Indeed, as noted in Judge Boggs' dissent, between 1995 and 1998, the law school enrolled between 44

and 47 members of the preferred minorities each year for a percentage varying from 13.5-13.7% of the entering class. *Grutter*, 288 F.3d at 801. This relative inflexibility demonstrates that the "goal" was in fact a quota, contrary to Justice Powell's direction.

Stillwagon further testified that the 10-12% "goal" could be achieved only through the special admissions program because of the " 'considerable differences' in academic credentials between the minority and non-minority applicants." *Grutter*, 137 F. Supp. 2d at 831. Professor Richard Lempert, the law school professor who chaired the faculty Admissions Committee that drafted the 1992 Admissions Policy, testified that the policy at one point sought a preferred minority admissions ratio of 11-17% but that these figures were omitted from the final version of the policy because the percentages were too rigid and could be misconstrued as a quota. *Id.* at 835.

Professor Lempert testified that the law school's race-preference policy was not intended as a remedy but to bring to the school a perspective different from members of groups which have not been discriminated against. *Id.* Justice Powell did find that the interest of diversity is a compelling interest, but in the same sentence raised the question whether the school's racial classification was necessary to promote that interest. *Bakke*, 438 U.S. at 314-15. He cautioned:

> Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.

Id. at 314.

In language critical to his opinion, Justice Powell declared: "Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* at 315. He cited the Harvard program

in which "the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." *Id.* at 316 (emphasis added).

In marked contrast, in the present case, law school Dean Jeffrey Lehman testified that in some cases race may be a "'determinative'" factor in admission to the law school. *Grutter*, 137 F. Supp. 2d at 834. Indeed, Dean Lehman testified that race is taken into account to the extent necessary to achieve a critical mass and that "a critical mass of minority candidates cannot be admitted unless race is explicitly considered, due to the gap in LSAT scores and UGPA's between minority and non-minority students." *Id.* Significantly, the concept of "critical mass" comes into play only in the context of race; there is no "critical mass" goal for those whose life was spent on a farm.

Justice Powell found that "[a] facial intent to discriminate" was evident in the school's race-preference program. *Bakke*, 438 U.S. at 318. However, such an infirmity would not exist in an admissions program where race or ethnic background is simply one element to be weighed fairly against other elements in the selection process. *Id.* Justice Powell further noted that the Harvard plan "has not set target quotas for the number of [minorities]." In such a program race "may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 317. Here, the law school did in fact set target quotas for favored minorities at the 10-12% level, *Grutter,* 137 F. Supp. 2d at 831, and, as noted by Judge Boggs, achieved a remarkably consistent minority admissions level of between 13.5 and 13.7% for the years between 1995 and 1998. The uniformity of these statistics demonstrate that the law school's "critical mass" was in fact a strictly observed race quota that violates Justice Powell's holding.

B. The Law School's Dual Track Admissions System Violates Justice Powell's Opinion

The Sixth Circuit noted that Justice Powell found the Davis admissions program unconstitutional in part because it operated under a dual track system, one for the preferred minorities and one for everyone else. *Grutter*, 288 F.3d at 744. Here, as part of its admissions process, the law school compiled admission grids each year showing applicants' LSAT scores and UGPA: one grid for all applicants and separate grids for various racial groups including African Americans, Native Americans, Mexican Americans, Hispanic Americans, Asian/Pacific Island Americans, Puerto Ricans, and Caucasians. *Grutter*, 137 F. Supp. 2d at 836 and n.19. The law school admissions director testified that the school maintained "daily reports" which broke down applicants into specific racial categories and that he consulted those reports in order to keep track of the racial composition of the class in order to ensure that a "critical mass" of minority students was admitted. *Id.* at 832. This "critical mass" was the minimum "goal" of 10-12% minority admissions. *Id.* at 830-31. Thus the law school's daily tracking of minority applicants in order to meet the preordained goal is merely a more sophisticated version of the dual track admissions system Justice Powell condemned in *Bakke*. The law school made no showing that it tracks the applications of farmers or other diverse applicants with the same attention it gives to members of the favored races. And the race preference does not "tip the balance" between closely matched applicants of different races; it is the decisive factor. Law school Dean Lehman testified that in 1995 all African American applicants with an LSAT score of 159-160 and a UGPA of 3.00 and above were admitted, but only 1 of 54 Asian applicants and 4 of 190 white applicants with such qualifications were admitted. *Id.* at 834 n.13. That is, 100% of African American applicants with those scores were admitted but only 1.85% of Asian and 2.1% of white applicants were admitted. These hugely disparate figures show that race was

not simply one element, it was the dominant, or in the words of Dean Lehman, the "determinative" factor. *Id.* at 834. These statistics make plain the law school's "facial intent to discriminate" through its dual track race-preference admissions program. As such, the program is in gross violation of the Fourteenth Amendment under the standard set by Justice Powell in *Bakke*.

II

RACIAL DIVERSITY IN EDUCATION IS NOT A COMPELLING STATE INTEREST

A. The Sixth Circuit's Ruling That an Amorphous Interest in Educational Diversity Justifies the Use of Racial Classifications Is Fundamentally Inconsistent with This Court's Equal Protection Rulings

The court below relied on Justice Powell's statement that educational diversity is a compelling state interest. *Grutter*, 288 F.3d at 738-39. Rather than following that dicta, this Court has counseled caution in finding governmental interests to be sufficiently compelling to justify use of racial classifications. "The history of governmental tolerance of practices using racial or ethnic criteria . . . must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications." *Fullilove v. Klutznick*, 448 U.S. 448, 486-87 (1980) (plurality opinion).

The district court found that "there has been no evidence, or even an allegation, that the law school or [T]he University of Michigan has engaged in racial discrimination." *Grutter*, 137 F. Supp. 2d at 869. Instead, the law school argued that it needs a particular racial composition to attain a "critical mass" of minority students so as to achieve the educational benefits of a diverse student body. *Id.* at 834. The argument that a concededly nonremedial interest in educational diversity permits the use of race in a law school's admissions process fundamentally conflicts with the holdings of this Court that only

carefully defined remedial interests will justify use of racial classifications.

The Sixth Circuit declared the fact that the law school's consideration of race lacks a definite stopping point did not render its program unconstitutional. *Grutter*, 288 F.3d at 751. Although it acknowledged this Court's directive in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that a race-conscious remedial program must be limited to the extent of the discriminatory effects it is designed to eliminate, the Sixth Circuit found:

> [T]his directive does not neatly transfer to an institution of higher education's non-remedial consideration of race and ethnicity. Unlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point. Indeed, an interest in academic diversity exists independently of a race-conscious admissions policy.

Grutter, 288 F.3d at 752.

Thus the court below found that a nonremedial race preference interest is entitled to last indefinitely while a remedial one is limited. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275-76 (1986) (plurality opinion), rejected an asserted nonremedial interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination." *Id.* at 274. That interest was found to be "too amorphous a basis for imposing a racia[l] classifi[cation]." *Id.* at 276. In addition, because the role model theory was not tied to remedying past discrimination, it "ha[d] no logical stopping point" (*id.* at 275) such that racial classifications based on it would be "ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276. The Sixth Circuit's authorization of the law school's race-preference policy, continuing into an unlimited future with "no logical stopping

point," is in blatant violation of the equal protection principles set forth in *Wygant*.

In *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), a plurality of this Court held that race classifications are justified only when used to remedy the effects of racial discrimination. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, there held, *id.* at 493:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb -- for example, a prison race riot, requiring temporary segregation of inmates -- can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens . . . ."

Id. at 521 (citations omitted).

Because the University's purported interest in operating a racially diverse law school is neither remedial nor necessary to prevent imminent danger to life and limb, the Sixth Circuit holding contravenes *Croson*. The holding is further inconsistent with this Court's precedents because racial diversity is an interest that is every bit as "amorphous" as the role-model rationale rejected in *Wygant*. Unlike programs enacted to further a remedial interest, whose breadth and duration must be narrowly tailored to address specific and

measurable incidents of discrimination, the inherent "indefiniteness" (*Wygant*, 476 U.S. at 276 (plurality opinion)) of Respondents' interest in maintaining an educationally diverse law school could easily " 'justify' race based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498 (plurality opinion). The Sixth Circuit holding thus leads to the perverse result that a nonremedial racial classification will see far wider application than remedial programs that are tied to the Fourteenth Amendment's "central purpose" of "eliminat[ing] racial discrimination." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). *Shaw* held that any governmental entity seeking to classify by race must point to specific, identified instances of past or present discrimination for which that governmental entity has been either actively or passively responsible. *Id.* at 909.

Implementation of racial preferences for the purpose of educational diversity violates the fundamental principle of equal protection. The mantra of diversity cannot rationalize the state's selection of applicants for inclusion in, or exclusion from, law school on the basis of their race.

B. The Rationale of Race Preferences as a Proxy for Educational Diversity Has Been Rejected by the Third, Fourth, Fifth, Seventh, Eleventh and District of Columbia Circuits

In *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fifth Circuit considered the constitutionality of the University of Texas Law School's race-based admissions program, which was enacted to further the nonremedial goal of "obtaining the educational benefits that flow from a racially and ethnically diverse student body." *Id.* at 941 (internal quotation omitted). Relying on *Croson*, the Fifth Circuit held that the program did not survive strict scrutiny because "non-remedial state interests will never justify racial classifications." *Id.* at 944. In accordance with this Court's admonitions in both *Croson* and *Fullilove*, the Fifth

Circuit noted that the dangers of even "benign" nonremedial racial classifications counseled in favor of restricting their use to remedial settings. *Id.* at 945.

The Fifth Circuit reaffirmed *Hopwood* in *Police Association of New Orleans v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996). There, the court struck down a nonremedial race-based program that sought to increase the number of African American police officers in supervisory roles to promote more effective policing, on the theory that "more African-American supervisors could better supervise African-American officers who in turn [are] needed to relate to the larger African-American population." *Id.* at 1168 (internal quotation omitted). Although noting the "validity of the City's goal" in the abstract, the court held that interest would not "justify a racial classification" because equal protection law dictated that a racial classification "must be narrowly tailored to remedy past specific instances of discrimination." *Id.*

In *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999), the issue was "whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body." *Id.* at 700. The constitutionality of using race preferences in a quest for student body diversity is the issue in the instant case. However, the Fourth Circuit held: "Such nonremedial racial balancing is unconstitutional." *Id.* at 705.

The Fourth Circuit further held in *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) (citation omitted):

> Classification based upon race must be justified by specific judicial, legislative, or administrative findings of past discrimination. It is the state that must show the existence of prior discrimination, and

> a strong evidentiary basis for concluding that remedial action is necessary.

(Citing *Croson*, 488 U.S. at 497 and 500.)

The Seventh Circuit pointed out in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1990), *cert. denied*, 500 U.S. 954 (1991): "The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination . . . ; only a purpose of remedying discrimination against minorities will do so."

The Eleventh Circuit held in *In Re: Birmingham Reverse Discrimination Employment Litigation v. Arrington*, 20 F.3d 1525, 1544 (11th Cir. 1994), that under strict scrutiny analysis, "the racial classifications must be necessary and must be narrowly tailored to achieve the goal of remedying the effects of past discrimination." In *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001), that court observed that "the fact is inescapable that no five Justices in *Bakke* held that student body diversity is a compelling interest under the Equal Protection Clause even in the absence of valid remedial purpose." *Id.* at 1248. While noting that the "weight of recent precedent is undeniably to the contrary, however," *id.* at 1250-51, the Eleventh Circuit declined to decide whether student body diversity may be a compelling interest and found that the race preferences in the University of Georgia admissions program were unconstitutional because they were not narrowly tailored. *Id.* at 1251.

The District of Columbia Circuit held in *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992), that a "racially-based program" "must rest on evidence at least approaching a prima facie case of racial discrimination." That circuit further stated in *Lutheran Church-Missouri Synod v. Federal Communications Commission*, 141 F.3d 344, 354 (D.C. Cir. 1998): "We do not think diversity

can be elevated to the "compelling" level . . . ." That decision held that the federal government does not have a "compelling" interest in broadcast diversity sufficient to support racial classifications for hiring on radio stations. In reaching its decision, the court explicitly noted two concerns present in this case: that the nonremedial interest in diversity was "too abstract to be meaningful" and therefore "justify[ing] . . . unconstrained racial preferences" (*id.* at 354-55), and doubts about the constitutionality of "encourag[ing] the notion that minorities have racially based views." *Id.* at 355.

The Third Circuit held in *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), that

> a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant." . . . .

The Third Circuit went on to rule that a challenge to "race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role." *Id.* at 597. Here, as the Sixth Circuit declares, the race-based preferences were not intended by the University to be remedial. *Grutter*, 288 F.3d at 737. The University's implementation of such preferences conflicts with the *Philadelphia* case in which the Third Circuit held that unless classifications based on race "are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 91 F.3d at 597 (citing *Croson*, 488 U.S. at 493). Further, in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997), that

circuit rejected diversity as an appropriate justification for affirmative action programs for public school teachers. The Third Circuit pointed out that the school board conceded that "there is no positive legislative history supporting its goal of promoting racial diversity 'for education's sake.'" *Id.* at 1558.

In contrast is *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000). There, the Ninth Circuit found that a challenge to the use of race as a criterion in the University of Washington Law School's admission process was mooted by the school's elimination of race as a consideration after the enactment of a statutory initiative prohibiting race preferences in, *inter alia*, public education. *Id.* at 1192 and 1195. Nonetheless, *Smith* followed Justice Powell's opinion in *Bakke* in holding that "the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures." *Id.* at 1200-01. The court so ruled notwithstanding its statement that it was "well aware of the fact that much has happened since *Bakke* was handed down. Since that time, the Court has not looked upon race-based factors with much favor." *Id.* at 1200.

III

THE SIXTH CIRCUIT'S RATIONALE THAT RACE PREFERENCES IN SCHOOL ADMISSIONS CAN BE JUSTIFIED BY THE ASSUMPTION OF VALIDITY OF RACIAL STEREOTYPES VIOLATES THE RULINGS OF THIS COURT AND CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS

The Sixth Circuit seeks to rationalize race preferences in admission to the law school by agreeing with Respondents that the school needs a particular racial composition to attain a "critical mass" of minority students so as to achieve the educational benefits of a diverse student body. *Grutter*, 288

F.3d at 737. The law school believes that certain minority students "are particularly likely to have experiences and perspectives of special importance to our mission." *Id.* at 747.

A. The Assumption of the Validity of Racial Stereotypes to Justify the Use of Race Preference Conflicts with the Rulings of this Court

The purpose of the Fourteenth Amendment Equal Protection Clause is "to prevent the States from purposely discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). The Fourteenth Amendment's intent is to ensure that all persons will be treated as individuals, not "simply as components of a racial . . . class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). *Miller* further held: "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Id.* at 912. In disregard of this warning, the Sixth Circuit decision approves a system of admitting law students so as to evaluate their "thoughts and efforts," or as here rephrased by the law school, their "experiences and perspectives" on the basis of their race. *Grutter*, 288 F.3d at 737.

This Court concluded in *Miller*, 515 U.S. at 927, by quoting *Edmonson v. Leesville Concrete Co. Inc.*, 500 U.S. 614, 630-31 (1991): "'If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.'"

The law school defends its race-preference program on the basis of a "public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession." *Grutter*, 137 F. Supp. 2d at 829 (quoting the law school bulletin for the 1996-97 academic year). That document singled out African American, Mexican American, Native American, and Puerto Rican (raised on the mainland) students for preference. *Id.*

The arguments made by the medical school in *Bakke* are remarkably similar to those put forward by the law school.

> The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;" (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Bakke, 438 U.S. at 305-06 (footnote and citation omitted).

Croson, 488 U.S. at 496, however, noted Justice Powell's opinion in *Bakke*, 438 U.S. at 307, "decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake,' forbidden by the Constitution." In like manner, the law school's racially segregated admissions plan, based on a desire to have a greater racial diversity for its own sake, is "discrimination for its own sake" and is similarly constitutionally proscribed.

Croson emphasized that proper findings of racial discrimination are necessary to define the scope of the injury and the extent of the remedy. 488 U.S. at 510. The rationale was plainly spelled out:

> Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.

Id.

The patronizing stereotype committed by the law school is that members of the designated minority groups cannot be expected to meet the same standards as other students. *Croson*, 488 U.S. at 493-94, cited Justice Powell's finding on race preferences in *Bakke*, 438 U.S. at 298, in warning against the philosophy behind the law school's program.

> "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

Respondents' reliance on the "experiences and perspectives" of minority students to justify race-conscious admissions, *Grutter*, 288 F.3d at 737, was effectively rebutted by Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990).

> Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.

Id. at 602 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

The Sixth Circuit's rationale that experience and perspective is dependent on the racial identity of the student is exactly the type of racial stereotype rejected in *Miller* and *Croson*.

B. The Reliance on an Assumption of the Validity of Racial Stereotypes to Justify Race Preferences Has Been Rejected by Other Circuits

In *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998), the First Circuit overturned a Boston public school's race-conscious admissions policy. The court found that "if justified in terms of group identity, the Policy suggests that race or ethnic background determines how individuals think or behave." *Id.* at 799. There, as here, the Boston school claimed that a minimum number of persons of a given race or ethnic background was essential to facilitate the school's policy. *Id.* The First Circuit, found, however:

> This very position concedes that the Policy's racial/ethnic guidelines treat "individuals as the product of their race," a practice that the [Supreme] Court consistently has denounced as impermissible stereotyping. *Miller*, 515 U.S. at 912.

Id. (footnote omitted).

The Third Circuit in *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia* relied on *Croson* in rejecting the use of racial stereotypes. 91 F.3d at 606. That court found that race-based preferences may be adopted only when there is a strong basis in evidence to conclude that remedial action is necessary. Only such a basis will provide "sufficient assurance that the racial classification is not 'merely the product of unthinking stereotypes or a form of racial politics.'" *Id.* at 610 (quoting *Croson*, 488 U.S. at 510).

The Fourth Circuit found in *Hayes v. North State Law Enforcement Officers Association*, 10 F.3d 207, 216 (4th Cir. 1993): "Classifications based on race carry a very real danger of stigmatic harm; they threaten to stereotype individuals because of their race and incite racial hostility."

In *Tuttle v. Arlington County School Board*, 195 F.3d 698, the Fourth Circuit took special note of

> the burden of the [racial classification] Policy on innocent third parties. The innocent third parties in this case are young kindergarten-age children like the Applicants who do not meet any of the Policy's diversity criteria. We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.

Id. at 707. The Fourth Circuit found it "both unfortunate and potentially pernicious that four year old children are directed by the state to identify themselves for admissions purposes as African American, Asian, Caucasian, [or] Hispanic." *Id.*

It is similarly unfortunate and pernicious that a state's law school, which should be teaching its students that the Fourteenth Amendment requires the state to view people as individuals rather than members of racial groups, *Miller v. Johnson*, 515 U.S. at 911, classifies and then prefers or discriminates against its applicants for admission on the basis of their race.

C. The Use of Racial Stereotypes by a State Law School to Create a Learning Environment for the Purposes of Teaching the Constitutional Invalidity of Racial Stereotypes Is an Exercise in Educational Hypocrisy

After this Court ruled in *Brown v. Board of Education*, 347 U.S. 483 (1954), that race-based discrimination in school admissions violated the constitutional rights of African Americans, many public officials in the southern states responded with defiance, including "subterfuges that evaded or drastically slowed desegregation." Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1014 (1989). As another commentator observed: "[D]isobedience, disrespect and massive resistance to the mandates of the United States Supreme Court are relatively old historical concepts practiced . . . [when] states had ideological and sociological views contrary to the edicts and mandates of the Court." Demet, *A Trilogy of Massive Resistance*, 46 A.B.A.J. 294, 296 (1960), as cited in *Pugach v. Dollinger*, 277 F.2d 739, 748 n.6 (2d Cir. 1960) (Clark, J., dissenting).

"Massive resistance" to the mandate of the Equal Protection Clause exists today on the part of many state authorities who are captives of ideological and sociological views contrary to this Court's interpretation of that mandate. This is particularly true with regard to the insistence of public universities, such as the University of Michigan and its law school, on perpetuating unequal treatment on the basis of race for the purposes of racial balancing. The best that can be said of the law school's position in this case is that it is asking the Court to allow the law school purposely to transgress one of the most fundamental constitutional principles, an individual's right to equal treatment under the law, so that the school can create a racially balanced learning environment. Beyond the clear irony of the law school's suggestion that the use of racial stereotypes is the only way for it to create an educational environment that is conducive to teaching that racial stereotypes are anathema under the law, is the compelling fact that the law school is unable to validate this logical contradiction and that the use of such legalistic hypocrisy is an unacceptable way to educate impressionable young minds in the requirements of constitutional law.

CONCLUSION

The Sixth Circuit opinion upholding race preferences on the basis of racial diversity conflicts with the decisions of this Court and of other circuit courts. Amicus therefore urges this

Court to reverse that decision and hold that racial diversity is not a compelling state interest and that the Fourteenth Amendment forbids the granting of racial preferences in admission to state-run schools.

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Respectfully submitted,

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